Supreme Court, U.S.
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No. 00-1023

In The

Supreme Court of the United States

RICH HALBMAN,

Petitioner,

v.

ST. LOUIS COUNTY, MISSOURI, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Individual Respondents respectfully suggest that the issue framed by Petitioner is more accurately stated as follows:

Was the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") correct in holding, by application of a corollary to the *Rooker-Feldman* doctrine, that the U.S. District Court for the Eastern District of Missouri ("District Court") lacked subject matter jurisdiction over Petitioner's general federal constitutional claims, where those claims are "inextricably intertwined" with a prior final state court judgment such that to grant Petitioner the relief requested would void or effectively overrule a state court judgment, and where, while not denominated a party to the state court action, the relators in the state court action were Petitioner's "virtual representatives", and Petitioner knew about the state court action, had ample opportunity to assert his claims in the state court action, and chose not to intervene?

PARTIES TO THE PROCEEDING

The "Individual Respondents" are Donna Asberry, John Asberry, Lisa Chambers, Mary Corbett, Kevin Grady, Elisabeth and Frank Kreminski, Mike Mccole, Susan Mccole, Greg Lasky, Joseph, Elaine, Thaddeus, Arthur, and Rosemarie Otzenberger, Ritamarie Otzenberger (deceased, by and through Elaine Otzenberger), and Melvin and Blanche Sutherland.[1] The Individual Respondents are the eighteen people who, on December 11, 1997, petitioned the St. Louis County Council for the disincorporation of what at the time was the city of Peerless Park pursuant to §79.495, R.S.Mo.

In addition to the Petitioner Halbman, Rich Lemonds was a an appellant before the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit"), and a plaintiff before the U.S. District Court for the Eastern District of Missouri ("District Court"). Certain other individuals listed by the Petitioner (Pet.(ii)), Vivian McCallum, Rich Meuller, Roger Niere, and Donald Thoele, were not parties to any proceedings below.[2] Rather, those individuals would have been parties as additional plaintiffs if the District Court had granted Plaintiffs Lemonds and Halbman leave to file a Third Amended Complaint. The District Court denied leave to file a Third Amended

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[1] Ritamarie Otzenberger died on September 30, 2000, in an automobile accident. Contemporaneous with their Brief In Opposition, the Individual Respondents file their Motion for Substitution of Parties.

[2] References to "Pet." herein are to the petition for a writ of certiorari.

PARTIES TO THE PROCEEDING – Continued

Complaint. The above named individuals never requested to intervene in the case, and were never parties. Petitioner's petition for a writ of certiorari does not raise an issue relating to the District Court's denial of leave to file a Third Amended Complaint, which was affirmed by the Eighth Circuit.

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COUNTER-STATEMENT OF THE CASE

Peerless Park was a city with a population of less than 100, located in St. Louis County, Missouri, organized under Missouri law as a city of the fourth class, §§79.010 *et seq.*, R.S.Mo.[3]

On December 11, 1997, the Individual Respondents together comprised two-thirds of the registered voters of what at that time was the city of Peerless Park. On that date, the Individual Respondents filed a petition with the County Council seeking to disincorporate the city without an election pursuant to §79.495, R.S.Mo. (1994).[4] The day after the Individual Respondents submitted their petition to the County, Petitioner Halbman registered to vote. (Supp.App. 130).[5] The County Council referred the

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[3] Petitioner incorrectly states that the reason Peerless Park was classified as "fourth class" was because it had fewer than 100 residents. (Pet. 3). While Peerless Park had only ten homes, and had a population well below 100, Petitioner's statement is incorrect. Peerless Park was not "fourth class" because of its small population, but because it elected to be organized as a city of the fourth class and governed by the laws for fourth class cities, §§79.010 *et seq.*, R.S.Mo., when it was incorporated as a city in 1990.

[4] §79.495, R.S.Mo. provides: "The county governing body of any county in which a city of the fourth class is located shall have the power to disincorporate such city upon petition of two-thirds of the voters of such city, without an election in such city, provided that the petition requests disincorporation without an election, and provided that the population of such city is less than one hundred."

[5] References herein to "App." are to the Appendix in the Eighth Circuit, and to "Supp.App." are to the Supplemental Appendix in the Eighth Circuit.

matter to a Hearing Officer, retired Missouri Supreme Court Judge John Bardgett, Sr., for an evidentiary hearing. After an evidentiary hearing, the Hearing Officer found that the statutory prerequisites of §79.495, R.S.Mo., had been met.[6] On March 11, 1998, the County Council enacted an Order to disincorporate Peerless Park, effective May 1, 1998.

Before the effective date of the disincorporation, the city, its mayor, and two of four of the city's aldermen filed an appeal of the County Council's Order in the Missouri Circuit Court for St. Louis County.[7] The

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[6] Petitioner incorrectly states that the evidentiary hearing before the Hearing Officer was, at the request of the individuals who petitioned for the disincorporation of Peerless Park, "focused on a sterile mathematical calculation" of whether the petition for disincorporation of Peerless Park had been signed by two-thirds of the city residents who were registered to vote on the date the petition was filed. (Pet. 4). Such a "sterile mathematical calculation" was not at the request of the Individual Respondents, but rather an imperative compelled by the applicable statute, §79.495, R.S.Mo.

[7] Petitioner incorrectly states that the state court action challenging the disincorporation of Peerless Park was brought by the city and two of its officials. (Pet. 4). First, the state court action was denominated *"State ex rel. City of Peerless Park, et al., v. Robert D. Young, et al."*. Under Missouri law, the plaintiffs in the state court action were "relators", prosecuting the action on behalf of the state. Second, the relators in the state court action included the city, the city's mayor, and two of four of the city's aldermen. The other two of the city's four aldermen were also parties to the state court action, are Individual Respondents herein, and were among the eighteen people who petitioned for the disincorporation of Peerless Park pursuant to §79.495, R.S.Mo.

disincorporation of Peerless Park was stayed pending the appeal.

Petitioner was the city's so-called "building commissioner" at the time the petition for disincorporation of Peerless Park was filed with the County Council, at the time the County Council issued its Order, at the time the state court action was filed and prosecuted, throughout the pendency of the state appeal, and until the city was finally disincorporated. (Supp.App. 131). As "building commissioner", Petitioner attended all meetings of the city's board of aldermen (Supp.App. 124), and considered himself "a part of the city". (Supp.App. 132).

Petitioner knew of the state court action and chose not to intervene in the case. (Supp.App. 124, 126). After more than a year of state court litigation, the County Council's Order was upheld and Peerless Park was finally disincorporated.[8]

More than two weeks after the Missouri Court of Appeals affirmed, on April 13, 1999, the Circuit Court's judgment, on April 30, 1999, Plaintiff Rich Lemonds, an alderman for Peerless Park at the time the city was disincorporated and while the state court action was pending, filed a federal lawsuit in the U.S. District Court for the Eastern District of Missouri ("District Court").[9] The Individual Respondents were not named as parties in the

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[8] *State ex rel. City of Peerless Park, et al. v. Robert D. Young, et al.*, No. ED74707 (Mo.Ct.App. April 13, 1999) (*affirming* Mo.Cir.Ct. for St. Louis County, No. 98CC1146) ("state court action").

[9] Petitioner incorrectly states that the federal action was filed "shortly before" the decision of the state appellate court's

original Plaintiff's complaint, but were granted leave to intervene as additional defendants.

In addition to his complaint, the original Plaintiff filed an application for temporary restraining order and a motion for preliminary injunction seeking to "reinstate" or "reincorporate" the disincorporated city of Peerless Park. After hearing arguments of counsel, the original Plaintiff's application for TRO was denied and his motion for preliminary injunction was set for hearing. After an evidentiary hearing, and well over one hundred pages of legal memoranda filed by the parties, the District Court denied the original Plaintiff's motion for preliminary injunction. The original Plaintiff appealed to the Eighth Circuit from the District Court's denial of his motion for preliminary injunction. The Eighth Circuit affirmed. Petitioner's petition for a writ of certiorari does not raise an issue relating to the Eighth Circuit's affirming of the District Court's denial of the original Plaintiff's motion for preliminary injunction.

After having been served with a First Amended Complaint on the eve of the evidentiary hearing on the original Plaintiff's motion for preliminary injunction, the Defendants objected to proceeding with the hearing on the original Plaintiff's motion for preliminary injunction. The original Plaintiff then withdrew his First Amended Complaint. (App., Tr., 5/14/99).

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affirming the County Council's Order to Disincorporate Peerless Park. The decision of the Missouri Court of Appeals was issued on April 13, 1999, more than two weeks before the federal action was filed.

On June 9, 1999, the District Court granted leave to file a Second Amended Complaint, naming Halbman, the Petitioner herein, as a second plaintiff. Immediately thereafter, the County Defendants and the Individual Defendants served their motions to dismiss the Second Amended Complaint, and in July, 1999, filed with the District Court complete "motion packages" pursuant to local rule.

Defendants moved to dismiss the Second Amended Complaint on three grounds: (1) that the District Court lacked subject matter jurisdiction by application of the *Rooker-Feldman* doctrine[10]; (2) that the plaintiffs' federal claims were barred by application of the doctrines of *res judicata* and *collateral estoppel*, because plaintiffs were "in privity" with the parties to the state court action, who were their "virtual representatives"[11]; and (3) the legal theories asserted by plaintiffs failed as a matter of law, i.e., that plaintiffs had no constitutional right to vote on the disincorporation of Peerless Park, or to notice that a petition for disincorporation without an election was being circulated.

On October 15, 1999, the District Court granted the motions to dismiss the Second Amended Complaint, and

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[10] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) ("*Rooker-Feldman*").

[11] *See, Tyus v. Schoemehl*, 93 F.3d 440 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1427 (1997) (" . . . a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with the person's interest as to be that person's 'virtual representative' ").

entered judgment against Plaintiffs Lemonds and Halbman and in favor of Defendants. The District Court held that the various constitutional claims asserted by plaintiffs in the federal action failed as a matter of law. In a footnote, however, the District Court stated:

> . . . the Court believes that if plaintiffs' claims did not fail as a matter of law for the reasons set forth *supra*, the Court would lack jurisdiction over plaintiffs' claims under the principles set forth by the Supreme court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), because granting the relief requested by plaintiffs would require this Court to "effectively reverse the state court decision" and "void its holding." *Snider v. City of Excelsior Springs, Missouri*, 154 F.3d 809, 811 (8th Cir. 1998). In the proceedings that took place in the Missouri court system, the Missouri courts upheld the disincorporation of Peerless Park, noted that there was no "constitutional right to vote on the disincorporation of a fourth class city", and even found that plaintiff Rich Lemonds was "not a voter" under Missouri law. The Court believes that granting plaintiffs the relief they seek would reverse these decisions made by the Missouri state courts. The court believes the *Rooker-Feldman* doctrine cautions the Court against granting such relief.

(Pet. 22a). The District Court did not reach other issues raised by the defendants, whether the plaintiffs' federal claims were barred by application of the doctrines of *res judicata* and collateral estoppel, because plaintiffs were "in privity" with the parties to the state court action, who were their "virtual representatives".

On October 18, 1999, Plaintiffs filed their notice of appeal. On August 3, 2000, The Eighth Circuit affirmed the District Court's dismissal of Petitioner's federal action on limited ground – that the federal lawsuit was barred by application of a corollary to *Rooker-Feldman*. The Eighth Circuit held in this case:

> Federal district courts are prohibited from exercising jurisdiction over general constitutional claims that are inextricably intertwined with specific claims already adjudicated in state court.

222 F.3d at 493. (Pet. 6-7a). The Eighth Circuit found the Petitioner's claims in this federal action were "inextricably intertwined" with claims asserted in the prior state court action. *Id.* If the Petitioner's federal claims were "separable from and collateral to" the merits of the state court judgment, it would not have been barred. *Id.* at 493-494. (Pet. 8a).

The Eighth Circuit did not reach other issues raised by the defendants, whether the plaintiffs' federal claims were barred by application of the doctrines of *res judicata* and collateral estoppel, because plaintiffs were "in privity" with the parties to the state court action, who were their "virtual representatives", or whether plaintiffs constitutional claims failed as a matter of law.

On September 18, 2000, the Eighth Circuit denied Plaintiffs' motion for rehearing.

On December 18, 2000, Petitioner filed his petition for writ of certiorari to this Court.

REASONS FOR DENYING A WRIT OF CERTIORARI

Rooker-Feldman is derived from two cases decided by this Court. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), this Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. Sixty years later, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that lower federal courts have no jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings", 460 U.S. at 486, or to decide questions "inextricably intertwined" with state court judgments, 460 U.S. at 483 n.16. *See*, 28 U.S.C.A. §1257. Together, the decisions in these two cases provide the framework for what has been called the *"Rooker-Feldman"* doctrine, herein *"Rooker-Feldman"*.

The decision of the Eighth Circuit in this case rests on a corollary to *Rooker-Feldman*: lower federal courts lack jurisdiction over general constitutional claims that are "inextricably intertwined" with specific claims adjudicated in a state court proceeding. *Lemonds v. St. Louis County*, 222 F.3d 488, 492-493 (8th Cir. 2000). (Pet. 5a-6a). In other words, *Rooker-Feldman* deprives lower federal courts of jurisdiction over a federal suit that would effectively overrule a state court judgment. *Id.*

The Eighth Circuit explained that a general federal claim is "inextricably intertwined" with a state court judgment if the federal claim could succeed only to the extent that the state court wrongly decided the issue before it. 222 F.3d at 493 (*quoting Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring)

("where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state court judgment")). The relief requested by Petitioner in his federal action, to "re-incorporate" the disincorporated city of Peerless Park, would effectively reverse a final judgment of a Missouri court upholding the disincorporation of Peerless Park.

Neither of the reasons given by Petitioner for a writ of certiorari support the granting of such a writ in this case. First, a writ should not be granted to resolve any "conflict" in the circuits over whether *Rooker-Feldman* can be applied to deprive the lower federal courts of jurisdiction of claims asserted by a nonparty to an earlier state court action. Whether lower federal courts may effectively overrule a state court judgment should not be determined by the identity of the parties, but by the nature of the relief requested. Moreover, if the identity of the parties were important to the application of *Rooker-Feldman*, this Court should nevertheless deny certiorari because the Petitioner should be deemed a party to the prior state court action because the relators in the state court action were his "virtual representatives", and Petitioner knew of the state court action while it was pending, had ample opportunity to assert his claims in the state court action, and chose not to intervene.

Second, the distinction Petitioner would draw between an alleged injury from a state court judgment and the underlying action the state court judgment affirmed, in this case, is a distinction without a difference. The state court judgment affirming the disincorporation

of Peerless Park cannot be separated from the underlying disincorporation of Peerless Park.

Finally, certiorari should not be granted because the application of *Rooker-Feldman* would not determine the outcome of this case because Petitioner's federal claims are barred by application of the doctrine of *res judicata* and fail on the merits as a matter of law.

I. CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE TO DETERMINE WHETHER *ROOKER-FELDMAN* DEPRIVES LOWER FEDERAL COURTS OF SUBJECT MATTER JURISDICTION OVER GENERAL FEDERAL CONSTITUTIONAL CLAIMS THAT ARE "INEXTRICABLY INTERWINED" WITH SPECIFIC STATE CLAIMS THAT WERE ALREADY ADJUDICATED, EVEN WHERE THE GENERAL FEDERAL CONSTITUTIONAL CLAIMS ARE ASSERTED BY A NONPARTY TO THE PRIOR STATE PROCEEDING.

A. THE EIGHTH CIRCUIT CORRECTLY DECIDED THAT, IN THIS CASE, *ROOKER-FELDMAN* DEPRIVED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION BY DETERMINING THE NATURE OF THE RELIEF REQUESTED, NOT BY THE IDENTITY OF THE PARTIES.

Petitioner would have this court grant certiorari to determine whether application of *Rooker-Feldman* should be determined by whether the party asserting general federal constitutional claims in federal court was a party to a prior state court proceeding, even if the general

federal constitutional claims are "inextricably intertwined" with specific claims already adjudicated in state court.

The only way for the District Court in this case to grant the federal relief requested, to "reincorporate" the disincorporated city of Peerless Park, would be to void or effectively reverse the state court. 222 F.3d at 493 ("to enjoin the disincorporation of Peerless Park – would, as a practical matter, directly nullify the final judgment of the state district court upholding the disincorporation. This fact alone may be sufficient to decide the case"). (Pet. 7a). However, the Eighth Circuit extended its analysis, to address application of *Rooker-Feldman* to deprive federal courts of jurisdiction where the new federal claim is different from the state court judgment – first, with respect to the nature of the claims, and second, with respect to the parties.

Where the federal claim is "separable from and collateral to the merits of the state court judgment", *Rooker-Feldman* would not deprive the lower federal courts of jurisdiction. 222 F.3d at 493-494 (*citing Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1034 (8th Cir. 1999) (*quoting Pennzoil*, 481 U.S. at 21 (Brennan, J., concurring)). (Pet. 7a-8a). In *dicta*, the Eighth Circuit noted:

> [I]t is sometimes permissible for a plaintiff to challenge the constitutionality of a state rule in federal court even though a state court has previously upheld a particular application of the rule to the same plaintiff, so long as the general federal challenge does not involve review of the state court decision.

222 F.3d at 494 (*citing Feldman*, 460 U.S. at 482-286). (Pet. 8a).

The Eighth Circuit held Petitioner's federal claims in this case could not be "separable from and collateral to those in state court". Petitioner's federal claims here were "nothing more than creative attempts to reclothe the failed due process claim in new constitutional garb". 222 F.3d at 494 ("federal plaintiffs cannot by artful pleading obtain a hearing of disguised state court appeals that would otherwise be subject to a *Rooker-Feldman* bar"). (Pet. 8a-9a).

Decisions in other circuits illustrate how a new federal claim, whether or not asserted by a party to a prior state court proceeding, would not be barred. For example, where a federal plaintiff seeks only prospective relief, rather than retrospective relief, *Rooker-Feldman* would not deprive a lower federal court of jurisdiction. *See, e.g., Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998), *cert. denied sub nom. Citizens for a Constitutional Convention v. Yoshino*, 525 U.S. 1103 (1999); *Valenti v. Mitchell*, 962 F.2d 288 (3d Cir. 1992).

Similarly, when the state court proceeding did not constitute an "adjudication" of an issue, *Rooker-Feldman* does not deprive lower federal courts of jurisdiction. *See, e.g., FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3rd Cir. 1996).

A second difference between a federal action and a prior state action was also addressed by the Eighth Circuit in this case, application of *Rooker-Feldman* to bar federal suits by persons who were not parties to the state court proceeding. 222 F.3d at 494-495. The Eighth Circuit

did not hold that Petitioner was a party to the prior state court action, indeed it assumed that Petitioner was not a party. However, the Eighth Circuit noted that Petitioner had "ample opportunity" to bring his claims in state court. 222 F.3d at 496. Petitioner was the city's building commissioner, and was "well aware" of the state proceedings. *Id.* ("[R]ather than pursuing their claims before the state court, appellants awaited the court's adverse ruling before attempting to bring their substantively identical challenges in federal district court").

The Eighth Circuit's decision in this case, and the decisions of other Circuits, reveal that it is the nature of the relief requested in the federal action and the nature of the prior state proceedings, not the identify of the parties, that triggers application of *Rooker-Feldman* to deprive lower federal courts of subject matter jurisdiction.

If the relief requested in a federal action would require a lower federal court to effectively void or overrule a state court judgment, the lower federal court lacks subject matter jurisdiction under *Rooker-Feldman*. On the other hand, if the relief requested in a federal action is prospective only, and would not require a lower federal court to effectively void or overrule a state court judgment, then the lower court would not be deprived of jurisdiction under *Rooker-Feldman*. The nature of the prior state court proceedings is also significant. If the prior state court proceedings were adjudicative, *Rooker-Feldman* would apply. On the other hand, if the prior state court proceedings were non-adjudicative or administrative in nature, *Rooker-Feldman* would not apply.

The Individual Respondents would not, and could not, undertake to reconcile every district court and court of appeals decision applying *Rooker-Feldman*. Yet, despite unfortunate "blanket statements" by various courts that *Rooker-Feldman* does not apply where federal plaintiffs were not parties to prior state court proceedings, an analysis of the cases cited by Petitioner, and other decisions within those same circuits, reveals that application of *Rooker-Feldman* (even in the "majority rule" circuits listed by Petitioner), is generally determined by whether assertion of federal court jurisdiction would interfere with state court proceedings, and not be the identity of the parties. Indeed, in many of the cases stating a "blanket rule" prohibiting application of *Rooker-Feldman* to federal plaintiffs who were not parties to prior state proceedings, the underlying facts reveal that *Rooker-Feldman* would not apply in any event.

Petitioner refers to a number of cases decided in the Third Circuit stating a "majority view" that *Rooker-Feldman* may not be applied to bar a suit by a federal court plaintiff who was not a party to earlier state court litigation. (Pet. 10-11). Despite a stated "blanket rule" about the application of *Rooker-Feldman* to federal plaintiffs who were not parties to state court proceedings, the facts of the Third Circuit cases cited by Petitioner reveal that the doctrine does not apply to nonparties who did not have a full and fair opportunity to assert their claims in the state court proceedings. For example, in *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996), cited by Petitioner (Pet. 11) as following the

"majority rule", the Third Circuit held that *Rooker-Feldman* did not apply to nonparties to a state court proceeding in which the state judge issued a gag order in an ongoing child custody case. FOCUS and several of its members attempted to intervene in the state case, but the state court refused to even entertain their motion to intervene. Although the Third Circuit stated a blanket rule that *Rooker-Feldman* did not apply to nonparties to the state action, the federal plaintiffs in *FOCUS* did not have a full and fair opportunity to litigate their claims in the state action. *See also, Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994) (*Rooker-Feldman* did not bar federal suit where relief requested by federal plaintiffs would in no way interfere with state judicial proceedings); *Valenti v. Mitchell*, 962 F.2d 288 (3d Cir. 1992) (held *Rooker-Feldman* did not bar federal suit where relief requested was prospective only, and federal plaintiffs did not have an opportunity to participate in state action).

The Petitioner also identifies the Sixth Circuit as following the "majority rule" denying application of *Rooker-Feldman* to federal plaintiffs who were not parties to a prior state court proceeding. (Pet. 12). However, in *Hart v. Comerica Bank*, 957 F.Supp. 958 (E.D. Mich. 1997), a district court in the Sixth Circuit recognized a distinction between federal plaintiffs who were not parties to prior state proceedings but who might have intervened and federal plaintiffs who had no opportunity to intervene in prior state proceedings. In that case, the court held that it lacked jurisdiction under *Rooker-Feldman*, but defined "parties" to include not only the actual parties to the prior state proceeding but also persons who "had the opportunity to intervene in [the state] proceedings and

doing so was necessary to preserve their rights". 957 F.Supp. at 970-971.

Petitioner also identifies the Ninth Circuit as following the "majority rule". However, in *Marriott International, Inc. v. Mitsui Trust & Banking Co.*, 13 F.Supp.2d 1059 (D.Haw. 1998), a district court in that circuit applied *Rooker-Feldman* to a party who had been denied the right to intervene in a state proceeding, holding that the denial itself was based on the state court's rejection of the very claim the party was attempting to assert in federal court.

Petitioner also characterizes the Tenth Circuit as following the "majority rule". However, in the case cited by Petitioner (Pet. 13), *Johnson v. Rodrigues*, 226 F.3d 1103 (10th Cir. 2000), the purported father of a child whose adoption had been obtained in Utah sought a declaratory judgment that Utah's adoption statutes were unconstitutional. The federal plaintiff in that case was not challenging the merits of a particular state court ruling, or seeking to have his child's adoption set aside.

Finally, Petitioner characterizes the Eleventh Circuit as following the "majority rule". (Pet. 13). However, in another case the 11th Circuit affirmed a decision by a federal district court in Alabama that applied *Rooker-Feldman* to bar a federal claim by a nonparty to a state proceeding. In *Williams v. Adkinson*, 792 F.Supp. 755 (M.D.Ala. 1992), *aff'd*, 987 F.2d 774 (11th Cir. 1993), a woman who claimed to be the illegitimate daughter of deceased country singer Hank Williams sued Hank Williams, Jr. (Sr.'s only heir), and Hank Williams' estate, seeking to recover a share of royalties. The state trial court ruled against the woman, who appealed only the

trial court's ruling in favor of the estate to the Alabama Supreme Court. Hank Williams, Jr., knew about the appeal, but did not seek to intervene. The Alabama Supreme Court reversed the trial court's ruling in favor of the estate, and remanded the case to the trial court for distribution of royalties to the woman. Hank Williams, Jr., filed a federal action. The district court held that the federal action was barred by *Rooker-Feldman*.

Thus, Petitioner's statement of a "majority rule" is not accurate. In fact, lower courts have generally applied *Rooker-Feldman* as a doctrine of judicial federalism to protect state court judgments. It is different from the doctrine of *res judicata*, under which the identity of the parties is significant in determining whether federal plaintiffs are seeking a "second bite at the apple". *See, Hachamovitch v. DeBuono*, 159 F.3d 687, 696 (2d Cir. 1998).

> The justification for applying *Rooker-Feldman* to nonparties depends on the crucial difference between the [*Rooker-Feldman*] doctrine and *res judicata*. *Res judicata* is designed to keep losers from relitigating. As such, it is largely limited to parties and those in privity with them; individuals who have not participated in the original litigation can hardly be described as relitigating. *Rooker-Feldman*, on the other hand, is designed to keep the lower federal courts from reviewing state court judgments – a purpose that depends not at all on the identity of the parties. If one accepts that under the current statutory scheme, lower federal courts should not be reviewing state court judgments (the premise of the whole doctrine), it is incongruous to create an exception for nonparties.

Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L.Rev. 1085, 1114 (1999).

The Eighth Circuit recognized in this case, that the application of *Rooker-Feldman* should be determined with reference to the nature of the relief requested in federal court and whether granting such relief would either void or effectively reverse a state court judgment, and not by the identity of the parties. To limit application of *Rooker-Feldman* to federal actions brought by a party to a state action confuses *Rooker-Feldman* with the doctrine of *res judicata*. 222 F.3d at 492. (Pet. 10a). *See*, Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1114 (1999) ("The purpose of the [*Rooker-Feldman*] doctrine is to prevent federal courts from reviewing state court judgments. This purpose is frustrated by the exercise of federal jurisdiction over suits challenging a state court judgment, regardless of who brings the suit").

Thus, certiorari should not be granted in this case to determine whether application of *Rooker-Feldman* should be limited to federal plaintiffs who were nonparties to prior state court proceedings.

B. EVEN IF THE IDENTITY OF THE PARTIES WERE TO DETERMINE THE APPLICATION OF *ROOKER-FELDMAN*, PETITIONER IS BOUND BY THE STATE COURT JUDGMENT BECAUSE THE RELATORS IN THE STATE ACTION WERE HIS "VIRTUAL REPRESENTATIVES".

Any distinction in the application of *Rooker-Feldman* based upon whether a party to the federal action was also a party to a prior state court action would not warrant granting certiorari in this case. Here, Petitioner should be deemed a party to the prior state court action. Both in the District Court and in the Eighth Circuit, *res judicata* was asserted, briefed and argued by the parties, but not reached by either the District Court or the Eighth Circuit.[12]

Petitioner was "in privity" with the city, the mayor, and the two aldermen who filed the appeal in the state courts. "Privity" for purposes of *res judicata* is legal similarity, and whether a nonparty in the prior action was adequately represented in the original action. "Privity" exists where the nonparty's interests were adequately represented by a party to the original suit. Such "representation" includes "virtual representation". *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). "[T]he courts have consistently held that a person may be bound by a judgment, even though not a party, if one of

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[12] The District Court dismissed the Second Amended Complaint because the federal constitutional claims failed as a matter of law. (Pet. 14a-22a). The Eighth Circuit affirmed, based solely on *Rooker-Feldman*. (Pet. 1a-13a).

the parties to the suit is so closely aligned with his interests as to be his *virtual* representative." *U.S. v. Schnick*, 66 B.R. 491, 494 (W.D.Mo. 1986) (*emphasis in the original*) (*citing Los Angeles Branch N.A.A.C.P., Minneapolis Branch v. Los Angeles Unified School District*, 750 F.2d 731 (9th Cir. 1984); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984); *Delta Air Lines, Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed.Cir. 1983). The burden is on the absentee to make a compelling showing of circumstances making representation inadequate in the particular case. *Meza*, 908 F.2d at 1266.

Petitioner's interests were represented in the prior state court action by application of the doctrine of virtual representation. While Petitioner himself was not a party to the prior state action, he is nonetheless bound by the judgment because the parties prosecuting the appeal, the city and certain of its officials, were his "virtual representatives". *See, Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1427 (1997) (*quoting Aerojet-General Corp. v. Askew*, 511 F. 2d 710, 719 (5th Cir. 1975)) ("a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with the person's interest as to be that person's virtual representative."). Petitioner's interests asserted in his federal action, and the interests asserted by the city of Peerless Park in the prior state action, Peerless Park's mayor and two of the city's aldermen, about the disincorporation of Peerless Park, are virtually the same.

Thus, even if, as Petitioner suggests, that *Rooker-Feldman* should only be applied to deprive lower federal

courts of jurisdiction over federal claims asserted by parties to a prior state court judgment, that would not warrant certiorari in this case, as Petitioner is bound by the prior state court judgment.

II. CERTIORARI SHOULD NOT BE GRANTED TO DETERMINE WHETHER APPLICATION OF *ROOKER-FELDMAN* SHOULD BE DETERMINED BY THE ALLEGED INJURY BECAUSE, HERE, THE DISINCORPORATION OF PEERLESS PARK IS INDISTINQUISHABLE FROM THE STATE COURT JUDGMENT AFFIRMING THE DISINCORPORATION OF PEERLESS PARK.

Certiorari should not be granted in this case to determine whether application of *Rooker-Feldman* should be determined by the alleged injury. Here, Petitioner suggests that because his alleged injury arises from the disincorporation of Peerless Park, not from the state court judgment affirming the disincorporation of Peerless Park, *Rooker-Feldman* should not apply.

Certiorari should not be granted in this case because the alleged injury, the disincorporation of Peerless Park, cannot be distinguished from the state court judgment affirming the disincorporation of Peerless Park.

III. CERTIORARI SHOULD NOT BE GRANTED BECAUSE, EVEN IF *ROOKER-FELDMAN* DID NOT DEPRIVE THE DISTRICT COURT'S JURISDICTION, THE DOCTRINE OF *RES JUDICATA* WOULD BAR PETITIONER'S CLAIMS AND PETITIONER'S CLAIMS WOULD FAIL AS A MATTER OF LAW IN ANY EVENT.

The County Respondents, in their Brief in Opposition, demonstrate that because the Petitioner's constitutional claims are barred by application of the doctrine of *res judicata*, and fail on the merits as a matter of law, that certiorari should not be granted. Application of *Rooker-Feldman* does not determine the outcome of this case.

The Individual Respondents will not restate those arguments and authorities.

CONCLUSION

Certiorari should not be granted, where the Eighth Circuit properly applied a corollary to *Rooker-Feldman*, holding that the District Court lacked subject matter jurisdiction over Petitioner's general federal constitutional claims, where those claims are "inextricably intertwined" with a prior state court judgment such that to grant Petitioner the relief requested would void or effectively overrule a state court judgment. While not denominated a party to the state court action, the relators in the state court action were Petitioner's "virtual representatives", and Petitioner knew about the state court action, had ample opportunity to assert his claims in the state court action, and chose not to intervene.

Certiorari should not be granted because the injury alleged by Petitioner, the disincorporation of Peerless Park, is indistinguishable from the state court judgment affirming the disincorporation of Peerless Park.

Finally, even if *Rooker-Feldman* did not deprive the District Court of jurisdiction, certiorari should not be granted because Petitioner's claims would be barred by the doctrine of *res judicata*, and would fail on the merits as a matter of law.

The Individual Respondents respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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